In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 568

ROBERT J. KIESLING AND BETTY LESTER KIESLING,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Robert J. Kiesling, the petitioner, divorced his wife in 1936. The decree provided, *inter alia,* that during his life the husband [1] was to maintain a term life insurance policy of $25,000 on his life with his wife as the sole beneficiary so long as she lived unmarried. Pursuant to that decree the husband obtained and delivered a life insurance policy to his wife. (R. 25a–27a.) [2] Under the terms of the policy, the

[1] For convenience, the terms husband and wife are used throughout this memorandum although the parties are no longer married.

[2] "R." references are to the portions of the record below printed in the Brief and Appendix for the Appellant.

husband reserved the right to change the beneficiary (R. 8a) and the wife, as revocable beneficiary, obtained "* * * no vested interest hereunder, and the Insured may exercise every right, receive every benefit and enjoy every privilege conferred by this policy * * *" (R. 12a).

The question presented is whether the husband may deduct premiums he paid on that policy from 1957 through 1959. The district court held that the husband was entitled to deduct 69.14 percent of the premiums he paid (R. 28a), and the court of appeals reversed (Pet. 24).

Alimony payments (including life insurance premiums) may be deducted by the husband only if they are "includible under section 71 in the gross income of his wife." Internal Revenue Code of 1954, § 215. Her gross income, in turn, includes periodic payments "received" from her husband in discharge of a legal obligation imposed by a divorce decree. Internal Revenue Code of 1954, § 71. Thus the question is whether the husband or the wife will be taxed on the amount of the insurance premiums. The Commissioner and the courts of appeals have consistently taxed the wife (and thus given a deduction to the husband) only where the wife's interest as beneficiary is absolute and not contingent. Rev. Rul. 57–125, 1957–1 Cum. Bull. 27; I.T. 4001, 1950–1 Cum. Bull. 27; *Piel* v. *Commissioner*, 340 F. 2d 887 (C.A. 2); *Smith's Estate*

v. *Commissioner*, 208 F. 2d 349 (C.A. 3); *Seligmann* v. *Commissioner*, 207 F. 2d 489 (C.A. 7).[3]

Here, the interest of the wife was subject to many contingencies. As the court of appeals noted (Pet. 21):

> * * * her interest in the policy ceased upon her death or remarriage during the taxpayer's lifetime; her designation as beneficiary was revocable; the policy had not been assigned to her and she had no right to assign it, or to obtain its cash surrender value or to borrow on it; under the policy's specific provisions she obtained "no vested interest" in it; and the taxpayer retained the right to "exercise every right, receive every benefit and enjoy every privilege conferred by this policy."

Since in these circumstances the courts have uniformly concluded that it would be unfair to tax the wife on the premiums paid by her former husband, the payments are not deductible by the husband under Section 215.

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[3] The petitioner points to a regulation, a revenue ruling and an extract from a Senate Finance Committee Report all of which concern other sections of the Code and claims that they are inconsistent with the position of the Government in this case. (Pet. 12–15.) Not one of those examples, however, would require the beneficiary of a life insurance policy whose interest was subject to extensive contingencies to include the premiums in income.

The decision by the court of appeals is correct. There is no conflict of appellate court decisions and no occasion for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
RICHARD M. ROBERTS,
Acting Assistant Attorney General.
MEYER ROTHWACKS,
THOMAS SILK,
Attorneys.

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